

The (un)sustainability of the sale of goods in Directive (EU) 2019/771

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Abstract: The topic of sustainability and its connection to the sale of consumer goods has been on the agenda since the adoption of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods. Although the Directive points towards the promotion of sustainability in the recitals, the solutions provided therein do not seem to be very efficient in this regard. The aim is to analyse the legal regime, pointing out the strengths and weaknesses of the solutions adopted regarding the promotion of sustainable consumption in the European context.

Keywords: Sustainability; Sale of Goods; Directive 2019/771; European Consumer Law.

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1. Sustainability: a new player in the sale of consumer goods legislation

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, met its final text on 20 May 2019, social, political, and legislative concerns around sustainability were not yet on the current scale. Despite not being an absolutely innovative or disruptive issue at the time, it was, however, a subject that was beginning to gain tangible expression in Europe and worldwide.

At an international level, Resolution 70/1 of the United Nations General Assembly, which set out the seventeen sustainable development goals to be achieved by 2030,¹ had already appeared on 25 September 2015. The Goal 12 is dedicated to “ensure sustainable consumption and production patterns”. At the European level, the most representative piece of attention to the issue is found in the European Ecological Pact of 11 December 2019.² More recently, with a focus on consumers and the ecological transition, we can find the New Consumer Agenda of 13 November 2020.³

¹ UNITED NATIONS GENERAL ASSEMBLY, *Resolution A/RES/70/1 (Transforming Our World: The 2030 Agenda for Sustainable Development)*, 25.09.2015.

² EUROPEAN COMMISSION, *The European Green Deal (Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions)*, Brussels, 11.12.2019.

³ EUROPEAN COMMISSION, *New Consumer Agenda (Communication from the Commission to the European Parliament and the Council)*, Brussels, 13.11.2020.

Interestingly, Directive 2019/771, even before these two pieces of legislation were enacted, presented sustainability concerns, albeit mostly in its Recitals. Both facts seem to reflect both the European impetus to leverage green legislation and its simultaneous timidity in taking significant steps in that direction.

In any case, the necessary legislative impulse aimed at reflecting in the legal regime the demands that have been made in terms of sustainability⁴ has finally been launched and, above all, we are witnessing a particularly relevant legislative awareness. The intelligibility of the consumer is seen as a crucial part in the achievement of sustainability. This is probably the most significant change of paradigm that has accompanied consumer legislation until today: a model that has favoured the possibility of consumers, individually,⁵ to consume as much and everything as they want.⁶

The purpose of this article is to analyse the amendments introduced by Directive 2019/771, distinguishing between their theoretical and practical suitability to achieve the results it seems to be pursuing.

⁴ Highly interesting is the perspective of M. GROCHOWSKI, 'European Consumer Law after the New Deal: A Tryptich' (2020) *Yearbook of European Law* 39 (1), pp. 387–422, p. 408, who states that consumers, by choosing certain goods or not buying them, not only express their position in relation to political values and objectives but also vote with their money, using their funds to directly or indirectly subsidise specific political agendas.

⁵ W. CORNETTA, 'Obsolescência: Da Origem ao Problema Social e Seus Reflexos à Sociedade' (12.2019) *Estudos de Direito do Consumidor*, pp. 313–54, pp. 315–19.

⁶ L. KRÄMER, 'On the Interrelation Between Consumer and Environmental Policies in the European Community' (1993) *Journal of Consumer Policy* 16, pp. 455–58 and 464–66.

2. (Still) the hierarchy of remedies in the sale of consumer goods Directives: a double-edged sword

The Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees established a hierarchy of rights to be exercised by the consumer in the event of lack of conformity of the goods. The result of this provision was that consumers could, in case of lack of conformity, ask for the repair or the replacement of the good. Article 3(3) was therefore peremptory: “in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate”. In this sense, only if repair or replacement were impossible or would involve disproportionate costs could the consumer ask the price reduction or the rescission of the contract.

However, being a minimum harmonisation Directive, Member States were able to go beyond its scope, conferring more and better rights to consumers,⁷ for instance, by not implementing the hierarchy.

In the most recent Directive on the sale of consumer goods (Directive 2019/771), the lawmakers chose to maintain the ancestral hierarchy between the remedies. Article 13 of the Directive now

⁷ In the words of the Directive, “Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection” [Article 8(2)].

stipulates that national provisions, if they did not already do so, must give precedence to the right to repair and the right to replacement, to the detriment of the right to a price reduction and the right to terminate the contract, except where this entails a disproportionate cost for the seller or where it is impossible to implement them. As this new Directive is a maximum harmonisation Directive, Member States were definitively given the task of establishing a hierarchy between rights if they had not already done so under the previous Directive.

The drafting of a new Directive on the sale of consumer goods aimed to overcome the most obsolete aspects of its predecessor, which is understandable considering the speed of global development that has been established since the end of the last century. Given the opportunity and also the sensitivity to the issue of sustainability that was expressed in the recitals, forward-looking legislation was expected in all its aspects.

It is therefore unclear why the hierarchy of consumer rights has been retained in the same terms as before. It is particularly puzzling that this hierarchy has remained specifically configured to give primacy to the right to repair and replacement, without, paradoxically, establishing a hierarchy between the two. It is an unknown factor, of course, especially from the perspective of sustainability; it will become more evident if the relevant criterion

has been that of maintaining the contractual relationship.⁸ Should the latter have been the *mens legis*, perhaps the recitals were not aligned with its own purposes.

Recital (48) of the Directive points out that the consumer should be able to choose between the repair and the replacement of the good in order to remedy the lack of conformity, as in 1999, and immediately clarifies that the option for repair (and only for repair) is related to the need to encourage a sustainable consumption, a concern to be debated. In fact, a Directive equipped with environmental concerns in its recitals has been prepared, a touch of originality for the standard of consumer legislation. However, it kept the logic of 1999, giving the consumer the right to remedy in the first place without ranking the right to replacement and the right to repair. If, as stated in the recitals, the right to repair in a priority place in the hierarchy contributes to the achievement of sustainability, in what way can the lack of a hierarchy between repair and replacement coexist with the same intentions?

On the one hand, the drive to harmonise the hierarchy in national legislation is to be welcomed since the idea of implementing a hierarchy, in the abstract, is likely to encourage more sustainable consumption. However, the key to making this hierarchy fruitful for the sustainable cause was that the hierarchy established was not

⁸ Following R.R. CONDON, ‘Sustainability, the Circular Economy and Consumer Law in Ireland’ (2020) *EuCML* 9 (5), pp. 218–22, p. 220, we understand that private law remedies focus on the individual contract, and it is quite challenging to integrate environmental externalities within its scope adequately.

exactly that of the previous Directive. On the other hand, if the solution found was not good for sustainability, it will not have been good either for the protection of consumers who, under this new Directive, are deprived of benefiting from a more beneficial regime allowed by the previous Directive.

Thus, if, at first sight, the conservation of a hierarchy between rights seemed a beneficial measure for sustainability, albeit without a more protective implementation of the consumer's position,⁹ the final result of the legal regime has kept the same orientation, without concrete results for sustainability, and without a better solution for consumers.

The right to repair in case of lack of conformity has been deeply scrutinised since the implementation of the Directive by the Member States has seen the light of day. There is a consensus that repairing goods is the least harmful way to bring them into conformity, at least in terms of environmental sustainability.¹⁰ In this sense, imposing on the consumer the prior exercise of the right to repair before exercising any of the other three rights would, with occasional exceptions, be an intelligible legal architecture from the point of view of the sustainability of the planet.

⁹ G. HOWELLS *et alii*, *Rethinking EU Consumer Law*, Routledge, London 2018, p. 186.

¹⁰ C. LIETKE *et alii*, *Right to Repair (Publications of the Advisory Council for Consumer Affairs)*, Advisory Council for Consumer Affairs at the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, Berlin 2022, p. 47.

However, as we have already had the opportunity to state, requiring repair as the only of the legal remedies or even as the first of the four remedies would mean a weakening of the consumer's contractual position in relation to the previous Directive and a step backward in terms of rights in relation to some domestic legislations.

Thus, it is important to analyse the values to be protected in the balance between sustainability and consumption. While it is true that there is an urgent need for awareness-raising measures and, perhaps going further, for the imposition of changes in current consumption patterns, alerting consumers to the environmental impact of their transactions,¹¹ it is also important to remember that consumer relations are private law relations. The mechanisms of reaction to a breach of contract cannot and should not be distorted. To demand the right to compensation as the sole or first remedy would be, from a purely contractual point of view, an insufficiency. And, above all, an ideological insufficiency, removing rights from consumers for a good cause, even if the cause (greatly) concerns those very same consumers.

Repair is generally speaking the best combination of response to the problems of both lack of conformity and the unsustainability

¹¹ As, for instance, A. MICHEL *et alii*, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' (2021) *EuCML* 10 (4), pp. 136–48, p. 145, suggest by instilling the possibility of reversing the logic of Article 14(4) of the Directive by enabling the seller to charge the consumer a fee for the period the consumer used the good before its replacement.

of the planet,¹² since it gives the consumer a good in conformity with the contract, allows the seller to maintain the contractual relationship, and avoids bankruptcy and the consequent disposal of the good. If the intention was (also) to promote sustainability, it is more difficult to agree with the solution composed by the European Union when giving primacy to repair and replacement in the same hierarchical place. In fact, the right to replacement, which may be requested by the consumer immediately in the event of lack of conformity, proves to be a very attractive remedy for the consumer,¹³ not particularly preferable for the seller, but fatal for sustainability, since it will motivate the existence of two goods to be treated at their end of life, doubling the problem.

On the other hand, the right to price reduction, with an almost artificial presence in the hierarchy, considering its scarce actual application, articulates, in a certain way, the interests at stake here, although it has been discarded for the second layer of remedies. The price reduction is likely to give continuity to the contractual relationship, being a positive aspect for both parties. Even so, it is not a remedy applicable to the generality of cases and can hardly rise to the category of primary remedy since maintaining a non-conforming good does not always please the consumer. It all depends, at the end of the day, on the size and typology of the lack

¹² Repair is even more energy efficient than recycling itself. See, on this topic, L. DUVALL *et alii*, 'The Fixer Movement: A Key Piece of the Circular Economy Revolution' in *Empowering Repair*, Ellen MacArthur Foundation 10.2016, pp. 5–6.

¹³ H. MICKLITZ, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' (2019) *EuCML* 8 (6), pp. 229–37, p. 236.

of conformity. Moreover, the solution of reducing the price may imply, in certain situations, the purchase of a new good, aiming to meet the need that has been resurrected with the obsolescence of the good, replicating the problem of end-of-life duplication. In any case, if the motto was sustainability, it might have been interesting to equate the possibility of occupying the podium with other remedies.¹⁴

Finally, the right to terminate the contract, although a remedy that definitively terminates the contractual relationship, could nevertheless have been selected as a primary remedy in light of the concerns on sustainability since it proves to be a better response than the replacement itself. Naturally, for a legal regime interested in regulating private law relationships, suggesting a remedy that strikes down that relationship is not a priority. In any case, restitution of the price paid for the good may (and probably will) entail the acquisition of a new good, achieving the same result as would be obtained with replacement. However, while it is true that the likelihood is that the consumer will acquire a new good to meet his or her needs, it is also true that his or her involvement in the situation may be liable to make him or her rethink the purchase. Furthermore, if this is one of the first remedies of the hierarchy, it would encourage the promotion of

¹⁴ However, it should be noted that price reduction does not always correspond to sustainability imperatives since sometimes the lack of conformity itself is the cause of more significant environmental damage. This rationale is pointed out by F. ZOLL *et alii*, 'Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods' (2022) *Transformacje Prawa Prywatnego* 3, pp. 146–47.

the durability of goods, especially with the producer, and therefore leverage the promotion of sustainability. Nevertheless, the right to terminate the contract, as well as the right to replacement, are the remedies that most polarise the interests that collide here. They do not suggest an adequate response either to the maintenance of the contractual relationship or to sustainable consumption.

The hierarchy in the manner provided for in the Directive, giving priority to the right to repair and the right to replacement, without ranking both, besides being ineffective for sustainability, also fails for some naivety, since the consumer, faced with the two options, will certainly not hesitate much in making a decision, particularly if little committed to the environmental cause.¹⁵ As already mentioned, the current configuration of the provision does not encourage the consumer to decide in favour of repair. Besides taking more time than the replacement, repair may still be refused for economic reasons.¹⁶

Strictly speaking, only the mandatory exercise of the right to repair in the first place,¹⁷ in order to establish a hierarchy, could truly

¹⁵ As stated by A. MICHEL *et alii*, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' (2021) *EuCML* 10 (4), pp. 136–48, p. 144, repair is only attractive to a minority of consumers, specifically those with either strong environmental motivations or emotional attachments to goods.

¹⁶ C. LIEDTKE *et alii*, *Right to Repair (Publications of the Advisory Council for Consumer Affairs)*, Advisory Council for Consumer Affairs at the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, Berlin 2022, p. 47.

¹⁷ On this point, we agree with E. MAITRE-EKERN *et alii*, 'Towards a Hierarchy of Consumption Behaviour in the Circular Economy' (2019) *Maastricht Journal of European and Comparative Law* 26 (3), pp. 394–420, p. 419.

assert itself as a solution guided by concerns about sustainability. The solution adopted in 2019 turned out to be the least interesting, taking into account the interests involved: the consumer remains, as in 1999, with only two rights in the first place; and the sustainable imperatives remain, as in 1999, de facto disregarded.¹⁸

The best configuration of a legal regime that protects the position of the consumer is still the one that does not establish a hierarchy between remedies (which has not been the orientation of any of the Directives). It allows him or her to obtain the best remedy for the concrete case. The best configuration of a legal regime promoting sustainability is the one that sets out repair as the first mandatory solution. The current regime, establishing a hierarchy between the four rights but not establishing a hierarchy between the first two, has managed to reconcile the worst of the two worlds, limiting the consumer in his or her range of options and allowing him or her, if he or she wants, to always opt for replacement.

¹⁸ In the sense that the consumer's choice between repair and replacement does not encourage the consumer to choose sustainable remedies, P. WEINGERL, 'Sustainability, the Circular Economy and Consumer Law in Slovenia' (2020) *EuCML* 9 (3), pp. 129–32, p. 131; and B. KEIRSBILCK, 'Sustainability, the Circular Economy and Consumer Law in Belgium' (2020) *EuCML* 9 (4), pp. 165–68, p. 167.

3. The maintenance of the liability period of the trader, on the one hand, and the extension of the period of presumption of anteriority of lack of conformity, on the other hand

A relevant amendment in Directive 2019/771 is related to the extension of the period of presumption of the existence of the lack of conformity at the moment of delivery, i.e., the period during which the consumer does not need to prove that the lack of conformity already existed when the good was delivered. Due to this legal orientation, the consumer may therefore benefit from the presumption of anteriority of the non-conformity, which means that the non-conformity that he claims will be presumed to have existed from the time of delivery. This circumstance clearly favours the consumer, even though it is not a new feature of this most recent Directive.

The 1999 Directive, in its Article 5(3), stated that “any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery (,,,)”. The new Directive, in its Article 11(1), extends this six-month period to one year.

First of all, it is interesting to note that the Directive does not provide for any extension of the actual period of the liability of the seller, although it leaves at the disposal of the Member States the possibility of establishing longer periods [under the terms of Article 10(3)]. This is what happened, for instance, in Spain and Portugal,

with the implementation of a three-year period of liability of the seller.¹⁹

On the one hand, the fact that the Directive does not determine a longer period than two years may be related to the understanding that the goods do not need to be more durable, which conflicts with the very purpose of promoting that durability. On the other hand, it may contain a deeper underlying idea, related to the promotion of a certain temporal pattern of consumer transactions that stimulates the European economy in a certain sense, i.e., a motivation according to which it is expected that consumers, after two years of use of a good, will consider a new purchase. It would be understandable if the latter were one of the reasons implicit in maintaining the liability period of the seller. The European institutions are certainly not interested in changing the economic structure of an entire society; and, if they were, it would certainly not be by means of a Directive. In this sense, we believe that both producers and sellers must be encouraged to switch to sustainable consumption, even if such an incentive is, precisely, an incentive in euros. Given the profit motives that companies are currently driven by, raising the prices of (sustainable) goods will be one of the main ways of balancing the issues that come together in this matter. In this way, the producer will be more encouraged and willing to manufacture sustainable goods, the seller to sell them and the consumer to buy these goods. Regarding this point, the awareness to be implemented also needs to be financial, explaining the advantages of acquiring a more expensive good

¹⁹ See Article 12(1) of Decree-Law No. 84/2021, of 18 October.

instead of several goods of the same type, albeit more affordable, over a lifetime.²⁰

As we said, the Directive did not extend the liability period of the seller, keeping it at two years. This paralysis is not particularly interesting for the promotion of sustainability, with some honourable exceptions, since it does not encourage the production of durable goods beyond two years. Although the assessment of non-conformity is not only related to the circumstance of the durability of the good, the liability period is mainly designed for the case of a lack of conformity related to durability. In situations where functionality is not at stake, such non-conformity is usually detected much earlier. For instance, we can think of the case where the consumer wants a blue good, and an orange one is delivered.

Even if it is understood that extending the period of liability would have encouraged a sustainable transition, the failure to monitor the period of the presumption of the existence of a lack of conformity at the time of delivery of the good is even more flagrant. Under the new Directive, the period in which the presumption is applied, which was previously of six months, is now of one year.

²⁰ In any case, most consumers seem willing to pay more for more durable products. Cf. ICF (on behalf of the Consumer Policy Evaluation Consortium), *Study on the Costs and Benefits of Extending Certain Rights under the Consumer Sales and Guarantees Directive 1999/94/EC*, Justice and Consumers, 03.2017, pp. 30–31; and LE EUROPE *et alii*, *Behavioural Study on Consumers' Engagement in the Circular Economy - Final Report*, Justice and Consumers, 10.2018, pp. 165–67.

Firstly, the innovation is to be welcomed, as it enables the problem of planned obsolescence to be fought more effectively²¹ (albeit timidly), as it does not burden the consumer with proving the existence of the lack of conformity at the date of delivery of the good. This is an immensely demanding task. However, although we agree, theoretically, with an extension of the period in which the presumption is applied, it should be noted that the Directive, in Article 11(2), allows Member States to extend this period beyond one year but limits them to a maximum period of two years. In our understanding, a better legislative policy would have been to give greater freedom to Member States in the transposition.

In fact, it must be admitted that the period of presumption of anteriority of the lack of conformity is at least as relevant, if not more so, as the period of liability of the seller. Although the extension of the liability period represents a factual advance in terms of consumer rights in general and sustainability in particular, the non-monitoring of the presumption period implies a very tangible difficulty in the exercise of consumer rights. After all, consumers hardly have the means (or, if they have them, they will hardly use them given the corresponding cost-benefit) to make efforts to prove such anteriority, which is what the law requires from them after the end of the

²¹ On the problem of planned obsolescence, see, among many others, A. FRANCESCHI, 'Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy: The Apple and Samsung Cases' (2018) *EuCML* 7 (6/2018), pp. 217–63. See also A. CHASSON, *et alii*, *Durable and Repairable Products: 20 Steps to a Sustainable Europe: HOP's Public Policy Guide to End Premature Obsolescence in the European Union*, HOP, 11.2020.

presumption period. Unless the producer or the seller publicly admit the lack of conformity, or if the consumer is unlikely to be able to produce such proof, it will be difficult to avoid the bankruptcy of the good for reasons related to the complexity of producing proof, which is disastrous for sustainability.

4. The right to compensation after the end of the trader's liability period and after-sales service

If the idea of allowing consumers to claim rights from the seller and the producer after the end of their period of liability might have caused surprise until now, the new text of the Directive opens up hostilities.

Recital (33) makes, for the first and only time, three references to spare parts. Part of the provision now reads as follows: “While this Directive should not impose an obligation on sellers to ensure the availability of spare parts throughout a period of time as an objective requirement for conformity, it should not affect other provisions of national law obliging the seller, the producer or other person constituting a link in the chain of transactions, to ensure that spare parts are available or to inform consumers about such availability”.

The Portuguese case is one of those that already had rules in this sense but reformulated them. The current legal solution now requires the availability of parts for a period of ten years after the last unit of

the good has been placed on the market.²² In many situations, probably the majority, the ten-year period will constitute an extension of what the consumer could obtain via the Consumer Protection Act, which contained an indeterminate concept that could be filled according to the type of good. Even so, in some situations, the ten-year period narrows the consumer's possibilities, namely, for instance, in what concerns the automobile sector, compromising in such cases the promotion of sustainability, rendering the lack of conformity of the good useless. Thus, it seems that the solution set forth in the Portuguese Consumer Protection Law, in this matter, will probably be the best of those available to promote sustainability, especially if conjugated with the new paradigm related to the concept of durability. The solution that does not seem to be at all aligned with sustainability will certainly be the one determined by the Directive, which offers the possibility for the Member States that do not provide after-sales assistance solutions to continue to do so.

²² After-sales assistance was already provided for in the Portuguese legal system, namely in the Consumer Protection Act (*Lei de Defesa do Consumidor*), in its Article 9(5): "the consumer has the right to after-sales assistance, including the supply of spare parts and accessories, for the normal average duration of the products supplied". After the transposition of the new Directive, Article 21(1) of Decree-Law No. 84/2021, of 18 October, now states that the producer must "make available the necessary spare parts for the repair of the goods purchased by the consumer for a period of 10 years after the last unit of the respective good has been placed on the market". In addition, Article 21(3) provides that the professional must, in the case of movable goods subject to public register, guarantee after-sales assistance under appropriate market conditions for a period of 10 years after the last unit of the good has been placed on the market. Finally, paragraph 4 of the same article states that "the trader must inform the consumer, (...) in the case of movable goods subject to public register, of the existence and duration of the duty to provide after-sales assistance".

Another innovative aspect implemented by the Directive, albeit in a minor way, is found in Recital (48). By invoking the concept of durability, suggesting that the option of repair in the event of lack of conformity should encourage sustainable consumption and “may” contribute to the durability of the goods, it seems that the legal regime is moving towards the assumption that a sustainable good is a good that, rather than being durable, must be repairable.²³ We follow this understanding in the sense that, even after the end of the liability period of the seller, the consumer must be able to demand that the good is repaired, either from the seller, the producer, or another trader (although, in all three cases, subject to the payment of a price) or by repairing the good by herself or himself.²⁴ In the latter case, the producer should, of course, include repair instructions.

5. Second-hand goods, second-hand rules

Despite the growing concern with sustainability, not only at the European legislative level but also on the part of consumers and other stakeholders, and the subsequent increase in circular consumption intentions, the new Directive does not implement significant changes in relation to its predecessor as far as second-hand goods are concerned. But, at the time, it was 1999. Similarly to

²³ In the sense that “durability” includes the very idea of “reparability”, cf. A. MICHEL *et alii*, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption’ (2021) *EuCML* 10 (4), pp. 136–48, pp. 138–39.

²⁴ E. TERRY, ‘A Right to Repair? Towards Sustainable Remedies in Consumer Law’ (2019) *European Review of Public Law* 27 (4), pp. 851–73, pp. 864–69; A. MICHEL *et alii*, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption’ (2021) *EuCML* 10 (4), pp. 136–48, p. 145.

the previous Directive, Article 10(6) establishes that in the case of second-hand goods, Member States can determine that the seller and the consumer may, by agreement, reduce the period of the liability of the seller up to one year. This has been the case in the transposition of 15 of the 27 Member States.²⁵

The possibility given to Member States to shorten the liability period of the seller in the case of second-hand goods is tainted with a certain prejudice against this type of goods, confirming the iconic remark by HANS-WOLFGANG MICKLITZ about the general feeling towards these goods: “old used products are second hand = second best products. They are waste, they are not raw material”.²⁶

It is understandable that a 1999 Directive allows the reduction of the liability period for second-hand goods. However, a 2019 Directive, to take effect in 2022, cannot maintain the status quo in such a decisive matter.²⁷ Moreover, a configuration like the one it ended up offering to the Member States even seems to conflict with the very intentions of ensuring a logic of durability of goods.²⁸

²⁵ M.B.M. LOOS, ‘Rubbish or Recycling? Furthering Sustainability by Developing Specific Provisions for the Sale of Second-Hand Goods’ (06.07.2022) *Amsterdam Law School Research Paper No. 15*, *Amsterdam Centre for Transformative Private Law Working Paper No. 02*.

²⁶ H. MICKLITZ, ‘Squaring the Circle? Reconciling Consumer Law and the Circular Economy’ (2019) *EuCML* 8 (6), pp. 229–37, p. 230.

²⁷ In the same vein, M.B.M. LOOS, ‘Rubbish or Recycling? Furthering Sustainability by Developing Specific Provisions for the Sale of Second-Hand Goods’ (06.07.2022) *Amsterdam Law School Research Paper No. 15*, *Amsterdam Centre for Transformative Private Law Working Paper No. 02*.

²⁸ E. ARROYO AMAYUELAS, ‘The Implementation of the EU Directives 2019/770 and 2019/771 in Spain’ (2022) *EuCML* 11 (1), pp. 35–40, p. 38.

The first reference in the Directive to the concept of durability appears in Recital (32), stating that this requirement should be included as an objective criterion for assessing the conformity of the goods. Recital (32) is, moreover, quite exhaustive concerning the concept of durability and even provides a definition of it.²⁹ The inclusion of the concept of “durability” as an objective requirement of conformity, provided for in Article 7(1)(d), even seems to be a premeditated innovation since the previous Directive already allowed the allegation of lack of conformity for reasons of durability, namely through Article 2(2). However, the new Directive seems to have wanted to ensure that the requirement of durability is even an aspect to be taken into account in the equation of the lack of conformity of the goods. Thus, if a good must be as durable as possible, it is not understandable that a used good might enjoy a protection period of only one year. The argument would be better understood if it concerned goods purchased before the current Directive came into force. On the contrary, a good purchased in January 2022, which is subsequently sold second-hand in June 2022, must be durable enough to reach at least 2024, but the Directive allows it not to be.

The distinction between new and second-hand goods is not a new issue. On the one hand, the most resonant argument in favour of establishing a shorter liability period relates to the different characteristics of new and used goods, especially those related to the

²⁹ “Durability in this Directive should refer to the ability of the goods to maintain their required functions and performance through normal use”, which is also the definition provided in Article 2(13) of the same Directive.

prolonged use of a good. On the other hand, another argument in favour of such a reduction relates to the need to balance the interests of both the consumer and the trader³⁰ since, in theory, the latter may be discouraged from operating in the second-hand goods market and, moreover, they do not always control the characteristics of the goods they sell. The protection of the position of the trader is an aspect to be considered in the drafting of the provision since too onerous a regime that would lead them to abandon the commercialisation of this type of goods would also not be a good solution from the point of view of sustainability.

The Directive clarifies in Recital (43) that “although a liability or limitation period of two years or more usually reconciles the interests of both the seller and the consumer, this might not be the case with regard to second-hand goods”. Once again, a surreptitious understanding of the devaluation of second-hand goods, which, by diminishing the protection of the position of consumers of second-hand goods, only reaffirms the inferiority of the latter,³¹ gathering more and more antipathy to this market.

Even if there are understandable reasons for creating different legal solutions depending on whether the goods are new or second-hand, such reasoning does not seem to extend particularly to

³⁰ Opinion of Advocate General Szpunar, Case C-133/16, *Ferenschild*, ECLI:EU:C:2017:284, para 81.

³¹ In the same vein, M.B.M. LOOS, ‘Rubbish or Recycling? Furthering Sustainability by Developing Specific Provisions for the Sale of Second-Hand Goods’ (06.07.2022) *Amsterdam Law School Research Paper No. 15*, *Amsterdam Centre for Transformative Private Law Working Paper No. 02*.

shortening the liability period for second-hand goods. It is incomprehensible that a consumer who buys a second-hand television from a trader should be less protected than a consumer who buys one first-hand in a situation where, a year and a half after delivery, it stops working. Nor should a consumer who buys a book that has already belonged to someone else be less protected than a consumer who buys a new book if he notices that page 5 is missing one year after the purchase.

Like the legal regime, the vast majority of consumers seem to consider that second-hand goods are less durable and less economically attractive.³² However, while it is clear that certain types of goods do indeed wear out through use, it is not equally true that this is a universal rule for all consumer goods. A few examples can be listed for illustrative purposes: mirrors, pictures, books, lamps, or even musical instruments fulfil their own purpose, even if they have been used before. In fact, the fact that a good is used does not automatically devalue it but may increase its value precisely because of being second-handed. Still, even in cases in which the use effectively diminishes the value of the good, it is not the circumstance that the good is used that devalues it. It is, on the contrary, the circumstance of the passage of time, previous misuse, or the poor quality of the materials originally used by the producer.³³

³² With due exceptions for goods customarily acquired for collecting purposes or, for example, when originally used by prominent public figures.

³³ In this sense, A. MICHEL *et alii*, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' (2021) *EuCML* 10 (4), pp. 136–48, pp. 137–38.

These aspects, as a general rule, can be controlled by the trader selling second-hand goods: a second look is enough.

It may, in any case, be argued that the reason behind the decrease of the liability period of the trader is related to the fact that they are in a risky position when selling used goods. However, we would always say that also in the sale of new goods, the trader has no significant control over the goods they sell unless they are the producer. Their decision is whether or not to contract with a certain producer and whether or not to sell certain goods. This possibility also applies to the seller of second-hand goods, who can choose which goods to sell and from whom to buy. It can also be argued that in this case sustainability may be compromised, as there will be fewer professionals interested in selling highly deteriorated goods. Again, it should be considered that the seller, fulfilling a diligent duty of information, has no reason to fear selling a highly “used up” good.

Thus, if a distinction between periods of liability for new and used goods were to be implemented, it would be better to implement a regime that differentiated between consumable and non-consumable goods or depreciable and non-depreciable goods instead of maintaining the traditional distinction between new and used goods.³⁴ At least, in this case, it would ensure what is really

³⁴ As stated in ANEC-BEUC, *Making More Sustainable Products the New Normal: Consumer Recommendations for a Meaningful EU Sustainable Product Initiative*, 2021, p. 13, currently, all consumer goods benefit from the same liability period, so for the purpose of making the circular economy

important to ensure in this matter: the degree of consumability of the good. Furthermore, a distinction based on the consumable or perishable nature would also contribute to the desired protection of the position of the trader since, by providing unequivocal information to the consumer on the factual situation of the good, it would contemplate the most unfavourable position in which the consumer may find herself or himself.

Also, in Recital (45), seeking to clarify the possibility of shortening the liability period in these cases, the following is stated: “leaving this question to a contractual agreement between the parties increases contractual freedom and ensures that the consumer has to be informed both about the nature of the good as a second-hand good, and the shortened liability or limitation period”. The new Directive is able to respond perfectly to the concerns expressed in this passage by establishing objective (and subjective) conformity requirements. In any case, the obligations to inform the consumer about the used nature of the good and the respective shortening of the liability period already arise, by law, at least from the right to information.³⁵

A key point in favour of reshaping the legal framework for second-hand goods remains. This aspect relates to the inadequacy of

a reality, liability periods for durable goods should last considerably longer. However, due to the different characteristics of goods, the provisions of the Directive may be inadequate to define liability periods.

³⁵ M.B.M. LOOS, ‘Rubbish or Recycling? Furthering Sustainability by Developing Specific Provisions for the Sale of Second-Hand Goods’ (06.07.2022) *Amsterdam Law School Research Paper No. 15*, *Amsterdam Centre for Transformative Private Law Working Paper No. 02*.

a liability period reduced to a minimum of one year. Based on the current understanding, consumers of second-hand goods are less protected in terms of time because these goods have already been used, which makes it impossible to expect them to last at least two years, the minimum required by the Directive for new goods. Let us take the example of the purchase of a tyre. The good, bought in 2022 as a new good, must be functional at least until 2024. If in 2024 it is sold as a second-hand good, the law will require it, if nothing is said to the contrary, to be usable until at least 2025. However, there is no reason to believe that the tyre will remain functional for that long if it is in normal use. In this and many other cases, even a deadline of one year is not adequate to deal with the actual situation. As we have seen above, the one-year time limit is not adequate to deal with the situation of goods that last much longer than one year by their own characteristics, nor is it, as we have now seen, adequate to deal with the situation of goods that (may) last much less than one year. Even if we take into account the controversial situation of clothing or electronic devices, there is no reason to believe that the liability period of one year protects the trader since if the good is tainted with some defect that cannot be controlled by it, there is a high degree of probability that this problem will manifest itself in the very first year.

6. Right to reject sustainability: is this what we are talking about in Article 3(7)?

Article 3(7) of the Directive 2019/771, under an article dedicated to the scope of application, reads as follows: “This Directive shall

not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days. In addition, this Directive shall not affect national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract”.

The Directive introduces the possibility of implementing the right to reject, which is a new feature in most of the Member States domestic legislations. The right to reject finds its origin in the legal system of the United Kingdom (known as the short-term right to reject), with the Consumer Rights Act 2015 providing, in its Article 19(3)(a), that if a good does not conform to certain characteristics (quality, lack of fitness for purpose or does not correspond to the description made of it or to the sample or model made available), the consumer may reject the good within 30 days, returning it or asking the professional to collect it and obtaining a full refund of the amount paid.³⁶ This option is somehow surprising. At a time when the United Kingdom was already preparing to definitively leave the European Union, the European institutions decided to open the door to the implementation of a rather English rule. Perhaps in the name of sustainability? We will try to find out.

³⁶ On this topic, see EUROPEAN COMMISSION, *Consumer Market Study on the Functioning of Legal and Commercial Guarantees for Consumers in the EU: United Kingdom*, Justice and Consumers, Brussels 2015, pp. 7–9.

The provision foresees that Member States might allow consumers to exercise rights other than those listed in Article 13. Member States may grant the consumers the right to a price reduction, the termination of the contract, or, indeed, any other right immediately, in the event of lack of conformity. This would have been an excellent initiative to start the experience of implementing other rights different from the usual quartet, testing the receptivity of consumers to demand more sustainable rights.³⁷ However, specifically in the Portuguese case, what ended up happening was that the lawmakers found in this mechanism the possibility to *reprise* part of the regime previously established in what concerns the hierarchy of remedies. The consumer can ask for immediate replacement or termination of the contract if the lack of conformity becomes apparent in the first 30 days after delivery. These are the two solutions with the worst consequences for sustainability.

On the one hand, the motivation behind this European innovation is to be considered: the standard seems to want to protect the position of the consumer, which is understandable. However, it seems that it was also designed to protect the consumers from the hierarchy of remedies it proposes itself. If that was the motivation, it would have been better to simply remove the hierarchy.

On the other hand, the provision, by implementing a kind of “right of withdrawal” for non-conforming goods, besides not

³⁷ In the same sense, A. MICHEL *et alii*, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption’ (2021) *EuCML* 10 (4), pp. 136–48, p. 143.

contributing in any measure to sustainability, distorts the very architecture of the legal regime.³⁸ In the first 30 days after delivery, a result is obtained that is apparently against the ratio of the Directive as a whole. As already mentioned, the termination of the contract is not a particularly sustainable remedy (even so, in the limit, more sustainable than the replacement of the good) since, even if, in the best hypothesis, the consumer does not acquire a new good with the return of the paid price, an end will always have to be assigned to the returned good, which may not be resaleable. Such situation entails an environmental burden, from the outset, in the double transportation (for the acquisition and return of the good)³⁹ and, finally, in the disposal of the good, which may, in the worst case scenario, imply the acquisition of a new product, which will also require a destination at the end of its lifetime.

7. The relevance of the producer in promoting sustainability

Although the focus of the consumer relationship is mostly placed on the interaction between the consumer and the seller, the consumer legislation also takes into account the producer, although not to a very significant extent.

³⁸ F. ZOLL *et alii*, ‘Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods’ (2022) *Transformacje Prawa Prywatnego* 3, pp. 123–24.

³⁹ F. ZOLL *et alii*, ‘Academic Proposal for Amending the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods’ (2022) *Transformacje Prawa Prywatnego* 3, pp. 123–24.

The new Directive has taken a significant step towards making the producer liable, which proves to be a relevant direction for the promotion of consumer rights and, at least in theory, may mean a significant step towards sustainability. In this context, the most interesting aspect concerns the introduction of the concept of commercial guarantee, which is interconnected with the concept of durability itself.

Article 17(1) of the Directive states, *inter alia*, that “where a producer offers to the consumer a commercial guarantee of durability for certain goods for a certain period of time, the producer shall be liable directly to the consumer, during the entire period of the commercial guarantee of durability for repair or replacement of the goods in accordance with Article 14”.

The provision, suggesting the self-responsibility of the producer regarding the goods it produces, is to be commended since it manifests the intention to encourage the producer to produce in a sustainable way. Traders who embrace such legal responsibility for conformity are encouraged, as a rule, to produce durable goods, so as not to bear the logistical and legal consequences that arise from the lack of conformity of the goods.

However, again in Article 17(1), the Directive provides that “the producer may offer to the consumer more favourable conditions in the commercial guarantee of durability statement”. This openness creates the possibility that the producer may be more lenient with regard to remedies in case of law of conformity than the legal regime

itself, which, in theory, is not a policy that should be looked down upon. However, if the producer intends to be lenient with regard to the policy for dealing with non-conforming goods, it could make a commitment to immediately replace the good regardless of the situation if the consumer so wishes, discouraging resource to repair and placing us before a threat in terms of sustainability.⁴⁰

8. Social responsibility is also sustainable consumption

The control of supply chains, from the perspective of social responsibility, is a subject that is not usually dealt with in depth in consumer law. More recently, with the advent of greenwashing and bluewashing practices, the violation of human rights in production chains has gained unprecedented expression in the private law relations context.

The 21st century has been fruitful in demonstrating the relevance of what happens along global value chains, a problem that is intrinsically related to social sustainability. It also underlines the absolutely unavoidable role of the producers in consumer relations, quite different from the secondary role that has been attributed to them over time. The Directive 2019/771 should have shown more sensitivity to the subject, especially in view of the overcoming of its

⁴⁰ In this sense, E. TERRY, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) *European Review of Public Law* 27 (4), pp. 851–73, p. 862.

predecessor, which was always guided by the primordial regulation of the direct relationship between the seller and the consumer.

In this aspect, if the Directive already fell short in terms of environmental sustainability, it is less energetic in terms of social sustainability. In fact, it does not make any reference to the imposition of a “dialogue” between the producer and the consumer (as it happened, for instance, in France⁴¹) in order to guide the consumer in the transition to sustainable consumption.⁴² This imposition would have been relevant, and even the appropriate place, to potentiate the change of the current unsustainable consumption paradigm. Note, therefore, that the producer, much more so than the seller, is in an excellent position to highlight the environmentally positive and negative aspects of the good it produces and the socially benign or malign consequences of the production method and conditions it uses.⁴³ In fact, the producer is the main, if not the only, agent capable of promoting socially responsible consumption, as it is the only one with a monopoly on

⁴¹ Which made it compulsory for producers to inform consumers about the durability, reparability, and environmental and social impact of certain goods. See Articles 13, 15, 19, 20, 27, 33, and 37 of Law No. 2020-105 of the French Republic, 10.02.2020.

⁴² On the need to introduce obligations regarding sustainability-related reporting, see E. MAITRE-EKERN, ‘The Choice of Regulatory Instruments for a Circular Economy’ in K. MATHIS and B. HUBER (eds.), *Environmental Law and Economics*, Springer 2017, pp. 305–34, pp. 315–28.

⁴³ Interestingly, D. O’ROURKE *et alii*, ‘The Impact of Sustainability Information on Consumer Decision Making’ (2015) *Journal of Industrial Ecology* 20 (4), pp. 882–92, conclude that, with certain exceptions, the environmental/social scoring system does not show any change vis-à-vis consumer purchasing behaviour. It is unclear whether this is due to the associated price, the lack of credibility of the scoring system, or the consumer’s indifference to the issue, which seems unlikely nowadays.

the conditions of production in its sphere of knowledge. This matter should be mandatorily embodied in the right to information, even as a conformity requirement. This is a topic deeply connected with the sale of consumer goods.

9. Eco-labelling: an absence

From the point of view of the pursuit of environmental sustainability, the implementation of compulsory ecolabelling of consumer goods would have been truly useful. Some authors believe that the mere transmission of information to consumers is not enough to change their decision to contract (and is, therefore, insufficient, by itself, in the process of transition to sustainable consumption⁴⁴). It may be that they are absolutely right. Even if this is understood, it is not easy to understand the absence of a reference to ecolabels or other forms of labelling.

In fact, the only reference to labelling is found in Article 7(1)(d), concerning the objective conformity requirements, and only contemplating situations in which the trader, on its own initiative, states that the good has a certain characteristic. In other words, the trader ends up having the advantage of not certifying absolutely

⁴⁴ D. O'ROURKE *et alii*, 'The Impact of Sustainability Information on Consumer Decision Making' (2015) *Journal of Industrial Ecology* 20 (4), pp. 882–92; A. MICHEL *et alii*, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' (2021) *EuCML* 10 (4), pp. 136–48, pp. 139–41; E. TERRY, 'The New Consumer Agenda: A Further Step Toward Sustainable Consumption?' (2021) *EuCML* 10 (1), pp. 1–3, p. 2.

nothing beyond what the law imposes, including information on sustainability.

On the one hand, this is understandable. The system on which European and global labels are currently based is not a particularly interesting system from the point of view of reliability and suitability. Since the vast majority of labels attesting to certain characteristics are awarded by private organisations, naturally driven by economic and possibly lucrative interests, they do not have the neutrality needed to generate confidence among the most sceptical consumers. In addition, being the certification systems, in general, optional, the traders, who are intended to encourage the use of ecological labelling (read, those who trigger harmful consequences through their goods/means of production), will simply avoid the certification process.⁴⁵

On the other hand, if the lawmakers are suspicious of certification schemes, it should at least encourage Member States to promote the use of labelling as a mechanism for communicating with the consumer about the sustainability of the good, since this may discourage some consumers from buying unsustainable goods.⁴⁶ More than nothing, yet no revolution. Moreover, if the European institutions are suspicious of existing certification systems, perhaps

⁴⁵ Regarding labelling in the textile sector, M.M. OLIVEIRA DA SILVA, “A Exploração Laboral no Setor Têxtil e o Direito do Consumidor à Informação: Que Convergência?” (2021) *Revista Electrónica de Direito* 25 (2), pp. 335–57, pp. 347–52.

⁴⁶ A. MICHEL *et alii*, ‘The New Consumer Sales Directive 2019/771 and Sustainable Consumption’ (2021) *EuCML* 10 (4), pp. 136–48, p. 139.

they should subject goods to the scrutiny of their own environmental and social impact monitoring systems, resolving several difficulties at a stroke.

We should not overlook existing specific European legislation imposing labelling in certain cases.⁴⁷ Indeed, this obligation already results from the very wording of Article 7 and, naturally, from the specific legal regimes. Nor are we indifferent to the fact that the treatment of the question may not be particularly relevant in this Directive. In any case, at least a reference to the respective regulations would have been justified. For instance, a paragraph could have been included in Article 7(1), referring precisely to the need to include specific information on labels. In Article 6(1), a paragraph could refer to the soft law mechanisms available and optional for professionals to adhere to,⁴⁸ reinforcing the central role that labelling, for the time being, for want of a better mechanism, still has.

⁴⁷ Examples include: Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017, setting a framework for energy labelling; Regulation (EU) 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products; Directive 94/11/EC of the European Parliament and of the Council of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the labelling of the materials used in the main components of footwear for sale to the consumer; and Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE).

⁴⁸ For instance, the EU Ecolabel or Fairtrade certification systems.

10. Concluding remarks

The Directive 2019/771 has embedded the concept of sustainability in consumer goods sales legislation for the first time, which in itself is a positive aspect. The introduction of this concern, even if only in the text of the recitals, demonstrates the impetus of the European institutions to continue the green movement by also seeking to promote sustainability through the role of the consumer.

However, given the emerging need to push sustainable consumption as an urgent imperative, the Directive does not go as far as it could have gone within its scope of action, rather revealing a trend toward the implementation of homeopathic remedies. Thus, from the perspective of sustainability, the final result of the text presents apprehensions in the recitals that are not truly reflected in the solutions provided by the provisions.

Some aspects are worth highlighting. The extension of the period of presumption of anteriority of the lack of conformity of the good, providing the consumer with greater accessibility to the exercise of his or her rights, is a positive aspect, although insufficient. Requiring repair in case of lack of conformity of the good, as one of the first remedies of the hierarchy, is another positive aspect from the point of view of sustainability. Finally, the introduction of the concept of durability is an interesting innovation toward sustainability.

However, the equal treatment of the right of repair and the right of replacement at the same hierarchical level, the system of second-hand goods, the opening up to the implementation of a right of

rejection, the poor use made of the role of the producer and the silence on ecological and social responsibility labelling are negative aspects to be pointed out.

The choice of prioritising consumer rights in the event of lack of conformity in the previous Directive was not particularly interesting for protecting the position of the consumer, so maintaining it in its current form in the new Directive is not particularly interesting, especially if we think that sustainability concerns are adjacent to it. The possibility of assigning different liability periods for new and used goods, favouring consumers of first-hand goods, is inconsistent with the intentions of ensuring sustainable consumption. Furthermore, opening the door to the possibility of the consumer exercising other rights in the event of lack of conformity within the first 30 days after delivery, particularly the right of termination, seems to us a bad solution. Finally, the failure to legislate in such a way as to invite the producer to discuss the matter, in particular by suggesting ways of communicating with the consumer through labelling and certification schemes, was a missed opportunity.